United Nations S/2017/210

Security Council

Distr.: General
10 March 2017

Original: English

Letter dated 10 March 2017 from the Permanent Representative of Turkey to the United Nations addressed to the President of the Security Council

I am compelled to write to you following receipt of the letter dated 9 March 2017 from the President of the International Residual Mechanism for Criminal Tribunals. It is of paramount importance for Turkey, a country that attaches the utmost importance to the rule of law and its international commitments, to set the record straight on the distortions and allegations referred to in the aforementioned letter.

First and foremost, I wish to underline that Aydın Sefa Akay, a Turkish national, has been arrested in Ankara on charges of being a member of the Fetullahist Terrorist Organization, which was behind the foiled coup attempt of 15 July 2016. That offence is punishable under the Turkish Penal Code, which applies to all persons in Turkey, all crimes committed in Turkey and all Turkish nationals.

Second, it is important to emphasize that the charges against Mr. Akay are in no way related to his functions as a judge of the Mechanism. On that basis, we have already brought our views to the attention of the Secretariat, based on the applicable legal instruments, including article 29 of the statute of the Mechanism, according to which Mr. Akay does not enjoy immunity before the Turkish judicial authorities for acts performed outside the framework of his assignment under the Mechanism. The relevant provisions of these legal instruments also confirm that immunities cannot be construed as a basis to develop or promote impunity or to impede the course of justice.

Against this background, the President of the Mechanism, on 31 January 2017, in the review proceedings of the *Augustin Ngirabatware* case, to which Mr. Akay had been appointed by the President on 25 July 2016, chose to issue a decision that orders the Government of the Republic of Turkey "to cease all legal proceedings against Judge Akay and take all necessary measures to ensure Judge Akay's release from detention as soon as practicable".

The Mechanism is not entitled to issue such an "order". Article 28 of the statute clearly indicates that States shall cooperate with the Mechanism and that it shall issue orders only in the framework of its sphere of competence, namely, carrying out the residual functions of the International Tribunal for the Former

Please recycle

Yugoslavia and the former International Criminal Tribunal for Rwanda concerning the prosecution of persons indicted by these Tribunals.

It is therefore with deep regret that I am obliged to bring to your attention that, by issuing the aforementioned "order", the Mechanism has clearly overstepped its mandate, conferred upon it by the Security Council. Moreover, the "order" in question constitutes a flagrant and worrying attempt to interfere with the independent judicial process of a Member State. Although States are required to cooperate with the Mechanism in accordance with Council resolution 1966 (2010) and the statute, the relevant provisions cannot be construed as binding upon States when the Mechanism oversteps the scope of its mandate. Therefore, Turkey should not be expected to comply with an "order" issued by the Mechanism when it has abused the authority vested in it. The "order" in question is null and void for Turkey.

Turkey has been a strong supporter of the International Tribunal for the Former Yugoslavia, the former International Criminal Tribunal for Rwanda and the Mechanism, which have contributed to the fight against impunity, as well as to the restoration and maintenance of peace and stability in those regions. In this framework, it is my duty to emphasize that the President of the Mechanism is causing undue delay in the administration of justice in the review proceedings of the *Augustin Ngirabatware* case by disregarding, with no valid justification, the relevant articles of the statute of the Mechanism that permit the appointment of new judges precisely in cases of unforeseen vacancies and thus purposefully misusing the authority entrusted to it by the Council. The responsibility stemming from the unnecessary delay caused by the present situation can by no means be ascribed to Turkey.

In the light of the above, Turkey is confident that the Council will consider ways to ensure that the Mechanism abides by its mandate and that it impartially, fairly and efficiently discharges the functions entrusted to it, including by reminding the Mechanism and its President of their sphere of competence and responsibilities and by considering enhanced mechanisms of accountability to the Council.

I should be grateful if the present letter would be brought to the attention of the members of the Security Council and circulated as a document of the Council.

(*Signed*) Feridun H. **Sinirlioğlu**
Permanent Representative